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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CARLOS NUMBERTO MORALES et al., Defendants and Appellants.	B253249 (Los Angeles County Super. Ct. No. KA098830)

APPEALS from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Jojola's and Sanchez's judgments are reversed in part and affirmed in part. Quesada's appeal is dismissed as moot.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant Phillip Joseph Jojola.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant Robert Epifano Sanchez.

David M. Thompson, under appointment by the Court of

Appeal, for Defendant and Appellant Arthur John Quesada.

No appearance for Carlos Numberto Morales on remand; Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appelant Carlos Numberto Morales.

Xavier Becerra and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Idan Ivri, Noah P. Hill, Victoria B. Wilson, Mark E. Weber, David F. Glassman and David Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Carlos Numberto Morales, Arthur John Quesada, Phillip Joseph Jojola and Robert Epifano Sanchez, all members of the same criminal street gang, attempted to extort money from Andres Vargas by threatening to harm him if he did not pay them $300. After Vargas did not pay, Morales shot Vargas multiple times, seriously injuring him.

A jury convicted all four men of conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1); count 1);[1] attempted willful, deliberate and premeditated murder (§§ 187, subd. (a), 664, subd. (a); count 2); attempted extortion (§ 524; count 3); and false imprisonment (count 4). On count 4 Morales, Quesada, and Jojola were convicted of false imprisonment by violence, menace, fraud or deceit, while Sanchez was convicted of the lesser included offense of false imprisonment (§§ 236, 237, subd. (a)). The jury also found true special criminal street gang enhancement allegations against all defendants on all counts

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[1] Statutory references are to this code.

(§ 186.22, subd. (b)); special firearm-use enhancement allegations against all defendants on counts 1 and 2 (§ 12022.53); and a great bodily injury allegation against Morales on counts 1 and 2 (§ 12022.7, subd. (b)).

The trial court sentenced each defendant to 25 years to life on count 1, plus 25 years to life for the firearm-use enhancement. For Morales the court also imposed the minimum 15-year parole eligibility term required by section 186.22, subdivision (b)(5). The court stayed the sentence on the remaining counts pursuant to section 654 for all defendants. For Quesada the court also found true the prior prison term enhancement allegation (§ 667.5, subd. (b)) but struck the additional punishment for that enhancement.

In a nonpublished opinion filed in February 2016 we affirmed the judgment as to Morales. We reversed Quesada's, Jojola's and Sanchez's convictions for conspiracy to commit murder based on instructional error, but affirmed their convictions for attempted premediated murder, attempted extortion and false imprisonment, rejecting their arguments there was insufficient evidence to support the convictions on the conspiracy and attempted murder counts and the true finding on the criminal street gang enhancement allegations.

Morales's petition for review was denied by the California Supreme Court on May 25, 2016, and the judgment is long since final. Quesada's, Jojola's and Sanchez's petitions for review were granted by the Supreme Court on May 25, 2016, but further action was deferred pending consideration of a related issue in *People v. Mateo* (review granted May 11, 2016, S232674; transferred to court of appeal March 13, 2019 [2019 Cal. Lexis 1638])—whether, to convict an aider and abettor of attempted

premeditated murder under the natural and probable consequences doctrine, both premeditation and attempted murder must have been reasonably foreseeable by an individual committing the target offense.[2]

Before *People v. Mateo* was decided by the Supreme Court, the Legislature enacted Senate Bill No. 1437 (SB 1437) (Stats. 2018, ch. 1015), which "amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder." (*Id*., § 1, subd. (f).) The Supreme Court then transferred this case to us with directions to vacate our decision and to reconsider it in light of SB 1437. (*People v. Morales* (Apr. 10, 2019, S233255) [2019 Cal. Lexis 2385].) As directed, we vacated our opinion as to Quesada, Jojola and Sanchez.[3]

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[2] The informal description of the question before the Court in *Mateo* read, "'In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99 [186 L.Ed.2d 314, 133 S.Ct. 2151] and *People v. Chiu* (2014) 59 Cal.4th 155?'" (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 85, fn. 17.)

[3] In supplemental briefing following the Supreme Court's transfer of the matter to this court, counsel for Quesada advised us his client had died in November 2016. Counsel nonetheless requested we permit Quesada to continue with Jojola and Sanchez as an appellant in the case because the question of SB 1437's effect on a conviction for attempted premeditated murder under the natural and probable consequences doctrine raises an important issue of law, citing *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217-1218. The court in *Sodersten*, however, explained it was resolving the issue before it, although

In *People v. Lopez* (2019) 38 Cal.App.5th 1087 (*Lopez*), which was also returned to this court by the Supreme Court with directions to reconsider our prior decision in light of SB 1437, we considered and rejected appellants' arguments that, as a matter of either statutory construction or equal protection analysis, enactment of SB 1437 precludes convictions for attempted murder under the natural and probable consequences doctrine. The *Lopez* analysis applies equally to Jojola and Sanchez's contention SB 1437 eliminates aider and abettor liability for attempted premeditated murder under the natural and probable consequences doctrine. (Accord, *People v. Munoz* (Sept. 6, 2019, B283921) __ Cal.App.5th __ [2019 Cal.App. Lexis 843].) Accordingly, we again affirm Jojola's and Sanchez's convictions for attempted premeditated murder, as well as for attempted extortion and false imprisonment, and reverse their convictions for conspiracy to commit murder. We dismiss Quesada's appeal as moot.[4]

FACTUAL BACKGROUND

1. *The People's Case*

Morales, Quesada, Jojola and Sanchez were members of the 18th Street gang. Vargas and his friend Bellanira Figueroa knew the defendants but were not members of their gang. The events leading to the shooting of Vargas occurred over the course of

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mooted by Sodersten's death, out of concern for the integrity of the judicial system. No such consideration is present here. Jojola's and Sanchez's appeals provide a full opportunity to resolve any relevant SB 1437 issues, and no other circumstance suggests Quesada's appeal should not be dismissed as moot.

[4] Our original opinion, filed February 17, 2016, remains the opinion of this court affirming the judgment in Morales's case.

three days in July 2012.

a. *The events surrounding the shooting*

On Friday, July 6, 2012 Vargas and Figueroa went to Quesada's house in Baldwin Park to smoke methamphetamine with Morales, Quesada, Jojola and Sanchez. Quesada's mother owned the house; Jojola lived there with Quesada and others.

After smoking methamphetamine Morales asked Vargas to take him for a ride in Vargas's car. Vargas, accompanied by Figueroa, drove Morales to El Monte. Morales brought with him a wig, a .357 Smith & Wesson revolver and a pillowcase. Upon arriving in El Monte, Morales got out of Vargas's car, robbed a pizza store, ran back to the car and directed Vargas to drive away. Morales, Vargas and Figueroa returned to Quesada's house and smoked more methamphetamine with Quesada, Jojola and Sanchez.

Later that night Vargas drove Morales and Figueroa to another pizza store in South El Monte, which Morales robbed. After the robbery they drove to a house in Monterey Park where Vargas's friend Justin lived so Morales could sell methamphetamine to Justin. Vargas knew, but did not tell Morales, that the house was in a "hot" area—that is, an area the police frequently patrolled.

When they arrived at Justin's house, Justin was not home. Morales and Vargas went inside the house to await Justin's return, while Figueroa stayed in Vargas's car. As they were waiting, a police car drove by; and the officer inside flashed a light on Justin's house. By text message Figueroa alerted Vargas to the police's presence. Minutes later, Morales left the house, got into the driver's seat of Vargas's car and drove away with Figueroa, while Vargas remained in the house.

The police officer, who had continued to watch Justin's house, followed Morales in his patrol car. The officer activated his patrol car's lights to stop Morales for a traffic violation. Morales refused to comply, leading to a police chase. Morales successfully avoided the pursuit and returned to Justin's house. He parked the car nearby and ran away, leaving his cell phone inside the car. Figueroa did not accompany Morales as he fled the area.

The next evening Vargas and Figueroa drove to Quesada's house to return Morales's cell phone to him. Vargas went inside and returned the phone, while Figueroa waited in the car. Morales, Quesada, Sanchez and Jojola were all in the house at the time. While in Jojola's room Morales and Quesada accused Vargas of "setting [Morales] up" with the police the previous night. They then escorted Vargas to the backyard to continue the discussion. Vargas sat down on the backyard stairs with Morales, Quesada, Jojola and Sanchez in close proximity: Morales was in front of Vargas; Quesada was kneeling or leaning down directly behind Vargas; Sanchez sat at a patio table behind Vargas; and Jojola was standing nearby.

In the backyard Morales and Quesada continued to confront Vargas about the prior evening's events. They told Vargas the setup was a sign of disrespect and said Vargas had disrespected not just Morales but all of them.

Morales and Quesada explained that Vargas would have to pay $300 for his disrespect. Vargas did not have the money with him. Morales then left to get Figueroa from Vargas's car outside, brought her to the backyard and sat her next to Vargas. Vargas told her the men "were asking him for $300 . . . [b]ecause [Morales] felt disrespected."

Morales and Quesada repeated the demand for $300 and threatened that Vargas needed to get the money "or else." Vargas understood this to be a threat on his life. The threat was accompanied by violence: Quesada struck Vargas with a closed fist to the back of his head and hit Vargas twice more with blows to his forehead. Morales and Quesada told Vargas he could not leave until they got the money and explained Figueroa would have to raise the money for him.

Morales told Figueroa she had until 1:18 a.m. to get the money, and, if she did not, it would be her "ass" too. Quesada then told Jojola to walk Figueroa out to Vargas's car. As Jojola walked her out, he told her, "Everything will be okay. Just get the money." Figueroa did not call the police once she left the house because she believed defendants would kill Vargas if she did.

In the early morning hours of July 8, 2012 Figueroa continued her search to raise the money. During that time Morales dragged Vargas to another area in the back of the house. Morales and Quesada then assaulted Vargas once again, punching and kicking him while he was on the ground. Quesada also struck Vargas with a heavy object that had been placed in a sock.

Throughout the early morning Morales and Jojola continued to follow up with Figueroa about the money. Jojola sent a series of increasingly ominous text messages, warning Figueroa that time was running out. He wrote, "Two can play games, you've got until 3:18 and game over"; "3:10 now, hurry up, time is running"; and "look hurry the fu[c]k up." Figueroa did not meet the 3:18 a.m. deadline and was never able to raise the $300.

For the rest of the day Vargas's movements were closely monitored and controlled. Morales took Vargas away from the house four times, using Jojola's car. Each time Morales kept to the same ritual, requiring Vargas to walk in front of him as Morales followed, holding his gun

The first trip occurred before daylight. Morales and Quesada tied Vargas's hands with rope and placed him in the back of Jojola's car. Morales drove Vargas around the area without any apparent destination and then returned to the house, where Quesada, Jojola and Sanchez remained. Later that day Morales took Vargas to a motel, knocked on a motel room door and left when he received no response. Morales drove back to Quesada's house, went inside with Vargas and left a couple of minutes later. Morales next drove Vargas to the apartment of Monica Freire, a friend of Morales, where they all smoked methamphetamine for about an hour. Morales and Vargas again returned to Quesada's house. Jojola and Sanchez were still in the house. Morales and Vargas remained there for more than an hour before they left for their final trip together.

Morales told Vargas he was going to drive him to Vargas's house, but instead took him to a secluded area in the mountains. Morales stopped the car and ordered Vargas to get out. Vargas pleaded with Morales that "he didn't have to do this." Morales insisted Vargas leave the car. As Vargas took his first step out, Morales shot him twice, striking him in the buttocks. Morales then left the car and shot Vargas four more times, striking him in the hip, groin and chest.

Vargas survived the shooting, but sustained life-long, debilitating injuries. He became paralyzed from the chest down with only limited use of his hands, requiring around-the-clock care.

b. *The police investigation*

On July 10, 2012 Covina Police Officer Oswaldo Preciado received a dispatch that a suspicious person was knocking on doors and asking for help at an apartment complex. Preciado went to the complex and found Morales hiding behind a dryer in the laundry room. Morales was perspiring profusely and appeared nervous, disoriented and confused. He said he was being chased and had been stabbed, though there was no evidence of any wound. The officer located a .357 Smith & Wesson revolver covered by a bloodstained T-shirt in the laundry room and a wallet belonging to someone in the apartment complex. Preciado believed Morales was under the influence of methamphetamine. Based on his paranoia and suicidal statements, Morales was hospitalized on a 72-hour psychiatric hold. In the hospital Morales admitted he had been using methamphetamine.

As part of the investigation into the shooting of Vargas, the investigating officer spoke with Vargas and Figueroa. Vargas identified Morales, Quesada, Jojola and Sanchez as being involved in the events surrounding the shooting. Figueroa described the perpetrators in the following manner: (1) Morales was "the main person running the show," who "was basically taxing [Vargas] the $300"; (2) Quesada was the man who "hit [Vargas] in the face"; (3) Sanchez was the man who "didn't allow [Vargas] to leave"; and (4) Jojola "was the one who was texting and calling" her.

c. *The gang evidence*

Los Angeles Police Officer Daniel Garcia, the People's gang expert, testified Morales, Quesada, Jojola and Sanchez were all members of the 18th Street gang with monikers and tattoos identifying them as gang members. Garcia also described the gang's criminal activities.

In Officer Garcia's opinion the crimes in this case were committed for the benefit of, at the direction of, or in association with the 18th Street criminal street gang. Garcia described the importance of respect in the gang culture, stating that "respect means everything." A sign of disrespect to one gang member, he added, is construed as a sign of disrespect to the whole gang. Garcia further testified a gang does not make threats lightly: If the gang issued "an ultimatum such as 'pay us $300 or else,'" the gang would follow through with the threat to avoid appearing "weak." Officer Garcia also explained the use of the "1:18" and "3:18" deadlines for paying the money was "to demonstrate that they're from 18th Street."

2. *The Defense Case*

Morales and Quesada each called witnesses for the defense; Jojola and Sanchez did not present any witnesses at trial. None of the defendants testified in his own behalf.

a. *Witnesses for Morales*

Morales called two expert witnesses—one on the effects of methamphetamine (Dr. Rody Predescu), and the other on criminal street gangs (Dr. Bill Sanders).

Dr. Predescu, a medical doctor, testified methamphetamine is a strong stimulant whose short-term effects can last 10 to 12 hours. Heavy users can experience insomnia, confusion, suspicion, paranoia and hallucinations and can become violent,

homicidal or suicidal. "They have a very false sense . . . that they can do whatever they please and they're not going to be caught, they will not pay the consequences for their acts." The effects of long-term use can mimic paranoid schizophrenic behavior, including suffering from hallucinations, paranoia, nervousness and violent behavior. Based on her review of the police and medical records, Dr. Predescu opined Morales, having used methamphetamine hours earlier, was under the influence of the drug both at the time of the shooting and at the time of his arrest.

Dr. Bill Sanders, a criminal justice professor, testified respect is important in gang culture, and gang members earn respect by committing violent crimes against rival gang members, not against someone who had done nothing to the gang. According to Dr. Sanders, Vargas was not a rival gang member and did nothing to disrespect the 18th Street gang. Dr. Sanders opined the shooting was not committed for the benefit of the 18th Street gang because no one from the gang had directed Morales to shoot Vargas, no other gang member was present at the time of the shooting, and Morales did not yell out, "18th Street" as he shot Vargas. Dr. Sanders also testified a gang member's use of methamphetamine carried a stigma that would bring that gang member less respect, and a "hyped up" member would not gain respect for shooting an addict who had done nothing to the gang.

b. *Witnesses for Quesada*

Quesada called three percipient witnesses—Freire; Avelina Urdiales, Quesada's mother and owner of the Baldwin Park house; and Manuel Alderete, a tenant in that house.

Freire testified Morales had called her on the July 6-8, 2012 weekend and asked if he could come to her apartment to smoke methamphetamine. Morales and Vargas arrived at the apartment on Sunday, July 8, between 10:00 a.m. and noon; and she smoked methamphetamine with Morales, Vargas and a friend of hers. Morales and Vargas stayed at the apartment for about two hours. During that time everyone was in a good mood, and nothing seemed unusual. At one point Vargas left the apartment by himself to get a lighter from Freire's car and then returned. Freire did not see Morales with a gun, and she saw no signs that Vargas had been injured in any way.

Urdiales testified she believed Morales, Jojola and her son were 18th Street gang members. She stated that her son and Jojola lived in her house in July 2012, along with Alderete and his girlfriend, who lived in a room off the back patio. On July 7, 2012 Urdiales returned to her house around 7:30 p.m. and saw her son, Morales and Jojola there. At 10:00 p.m. Vargas and Figueroa arrived at the house and went to the backyard. A few minutes later Figueroa came inside, looking angry or upset. Urdiales did not go into the backyard. While Urdiales was inside the house, she did not hear any yelling or fighting in the backyard.

Urdiales went to sleep in her son's room at about 1:00 a.m. on July 8 and woke up at 6:00 a.m. At about 8:00 a.m. Vargas entered the house from the backyard, greeted her and got food from the kitchen. At about 8:30 a.m. Morales arrived at the house; and he, Quesada, Jojola and Vargas went into the backyard. At 9:00 a.m. Morales and Vargas left the house, drove away in Jojola's car and returned three hours later. At about 4:00 p.m. Morales and Vargas left the house again and drove

away in Jojola's car, while Quesada and Jojola sat on the front porch. Urdiales left the house at 6:00 p.m. and did not see Morales or Vargas again that day. Urdiales never saw Morales with a gun or Vargas with his hands tied. Neither did she see any cuts, bruises or swelling on Vargas nor hear him complain of pain or injuries.

Alderete, an ill and elderly man, testified he spent most of his time in his room at Quesada's house. On July 7, 2012 Alderete left his room in the afternoon and saw a few men on the side of the house. He returned to his room, watched television until about 10:00 p.m. and then went to sleep. He did not hear any yelling or the sound of anyone being beaten. On July 8, 2012 Alderete woke up at 7:00 a.m. and saw only Urdiales, Quesada and Jojola in the house. Later that afternoon Alderete saw a man wearing a wig. Alderete left the house and returned at about 3:00 p.m. and saw only Urdiales and Jojola at that time.

DISCUSSION

1. *The Trial Court Committed Prejudicial Error in Instructing on Conspiracy To Commit Murder*

"'Conspiracy is a "specific intent" crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of that offense.'" (*People v. Swain* (1996) 12 Cal.4th 593, 600; accord, *People v. Penunuri* (2018) 5 Cal.5th 126, 144-145; *People v. Smith* (2014) 60 Cal.4th 603, 616.) In charging conspiracy to commit murder, therefore, the prosecution must prove not only that the defendant

intended to conspire, but also that the defendant intended to kill the victim. (*People v. Garton* (2018) 4 Cal.5th 485, 516; *Swain*, at p. 607.)

Morales, Quesada, Jojola and Sanchez were each charged with conspiracy to commit the murder of Vargas. As to this count the trial court instructed the jury using a variant of CALJIC No. 8.69. The default phrasing of CALJIC No. 8.69 reflects the twin specific intent requirements for conspiracy to commit a particular offense, specifying that *"[e]ach* of the persons specifically intended to enter into an agreement with one or more other persons for that purpose," and that "*[e]ach* of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being." (Italics added.) However, as read to the jury, the instruction in this case stated in part, "In order to prove this crime, each of the following elements must be proved: 1. Two or more persons entered into an agreement to kill unlawfully another human being; 2. *At least two* of the persons specifically intended to enter into an agreement with one or more other persons for that purpose; 3. *At least two* of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and 4. An overt act was committed in this state by one or more of the persons who agreed and intended to commit murder." (Italics added.)

Jojola and Sanchez contend, in so instructing the jury, the court committed prejudicial error by failing to include the requirement that the jury must find that each of them, not just

any two of the coconspirators, intended to kill Vargas.[5] They are correct.

As the Supreme Court explained in *People v. Garton*, *supra*, 4 Cal.5th at page 516, using this version of the instruction, substituting the phrase "'*[a]t least two*,'" for "each," is appropriate only when a conspiracy involves the """"feigned participation of a false coconspirator or government agent."""[6] Asking the jury to find specific intent for "at least two" conspirators in a conspiracy with more than two members, none of whom is feigning

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[5] The People argue Jojola and Sanchez forfeited any claim of error by failing to object to the instruction as given by the trial court. However, pursuant to section 1259, we may review any instruction given "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." That exception to the general rule of forfeiture applies here. (See *People v. Myles* (2012) 53 Cal.4th 1181, 1219, fn. 12 [forfeiture rule does not apply when "the court gives an instruction that incorrectly states the law"]; *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183 [a defendant's substantial rights are affected if the instruction was reversibly erroneous"].)

[6] The Use Note to CALJIC No. 8.69 cautions that the alternative, "at least two" wording is provided to address the situation that arose in *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131, in which one of the participants in the conspiracy was a "false coconspirator," a confidential informant for the FBI. (Use Note to CALJIC No. 8.69 (Spring 2008 ed.) p. 441.) Quoting *Liu* at page 1130, the Use Note states, "'The "feigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other co-conspirators who actually agree to the commission of the subject crime, specifically intend that the crime be committed, and themselves commit at least one overt act . . . ."'"

involvement, is error, the Court held (and the People conceded in *Garton*), because it "could potentially lead a jury to find an individual conspirator guilty without finding that he or she possessed a specific intent to agree or to kill." (*Ibid.*; see *People v. Petznick* (2003) 114 Cal.App.4th 663, 681 [same erroneous CALJIC No. 8.69 instruction "permitted the jury to find defendant guilty of conspiracy to commit murder without regard to whether or not he personally intended to kill so long as they found that at least two of the other participants harbored that intent"].)[7]

Whether giving the incorrect instruction was harmless error must be measured by the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] because each defendant's specific

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[7] The written version of the instruction contained in the clerk's transcript on appeal read, "In order to prove this crime, each of the following elements must be proved: [¶] 1. Two or more persons entered into an agreement to kill unlawfully another human being; [¶] 2. *Each At least* two of the persons specifically intended to enter into an agreement with one or more other persons for that purpose; [¶] 3. *Each At least* two of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and [¶] 4. An overt act was committed in this state by one or more of the persons who agreed and intended to commit murder." (Italics added.)

Although the written version of an instruction generally governs if there is a conflict between oral and written instructions (see *People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113), the written instruction here did nothing to correctly inform the jury that the "each" language, not the "at least two" language, applied.

intent to commit murder is an essential element of the offense. (*People v. Wilkins* (2013) 56 Cal.4th 333, 348 ["[w]hen the jury is 'misinstructed on an element of the offense . . . reversal . . . is required unless we are able to conclude that the error was harmless beyond a reasonable doubt'"]; see *People v. Brooks* (2017) 3 Cal.5th 1, 69 ["'[m]isdescription of an element of a charged offense is subject to harmless error analysis and does not require reversal if the misdescription was harmless beyond a reasonable doubt'"]; *People v. Petznick*, *supra*, 114 Cal.App.4th at p. 681.) That is, Jojola's and Sanchez's convictions for conspiracy to commit murder must be reversed "unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

"[I]n order to conclude that an instructional error '"did not contribute to the verdict'" within the meaning of *Chapman* [citation], we must '"find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."'" (*People v. Brooks*, *supra*, 3 Cal.5th at p. 70.) The incorrect phrasing of CALJIC No. 8.69 here, which permitted the jury to find Jojola and Sanchez guilty of conspiracy to commit murder without regard to whether they personally intended to kill Vargas, was far from unimportant. Indeed, the jury was also instructed pursuant to CALJIC No. 6.11 that a member of a conspiracy "is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime [or] act of a co-conspirator to further the object of the conspiracy, even though that crime [or] act was not intended as a part of the agreed upon objective and even though he was not

present at the time of the commission of that crime [or] act"—thereby reinforcing the erroneous concept that Jojola and Sanchez could be guilty of conspiracy to commit murder, even if they did not intend to kill Vargas, because they conspired with Morales and Quesada to extort money from the victim.

The court's additional instruction that "[e]ach defendant in this case is individually entitled to, and must receive, your determination whether he was a member of the alleged conspiracy" (CALJIC No. 6.22) did not cure the error in CALJIC No. 8.69, as it merely told the jury that it had to consider individually whether each defendant was a member of a conspiracy, not that each of them had the specific intent to kill Vargas. Similarly, nothing in counsel's closing arguments corrected the erroneous implication of CALJIC No. 8.69 as given. Both the prosecutor and Morales's counsel repeated the "at least two" language in closing argument. None of the other counsel clarified the error. At best, the lawyers for Sanchez and Jojola argued that their respective clients did not actually have the required intent.

Nor can we say that the evidence against Jojola and Sanchez on this charge was so overwhelming that the jury verdict would have been the same had it been properly instructed. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 666 [appropriate test to determine whether an instruction that erroneously omitted an element of an offense was harmless is whether the record establishes beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error]; *People v. Mil* (2012) 53 Cal.4th 400, 417 [reviewing the record to determine if "the record supports a reasonable doubt as to [the omitted] element" of the offense].) The evidence of an agreement to kill

Vargas was circumstantial, based on defendants' actions and gang affiliation. Indeed, in closing argument the prosecutor acknowledged that Morales and Quesada played a "more active" role than Jojola and Sanchez: Morales was the actual shooter; Quesada demanded that Vargas pay $300 "or else" and physically assaulted him. Thus, the jury could well have concluded that those two conspirators possessed the requisite intent to kill Vargas and that, under CALJIC No. 8.69, nothing more was required to also convict Jojola and Sanchez on that count. Although, as discussed in the following section, there was substantial evidence to support the convictions of Jojola and Sanchez, we cannot conclude beyond a reasonable doubt that the jury found Jojola and Sanchez were each one of the "at least two" members of the conspiracy who actually intended to kill Vargas.

2. *Substantial Evidence Supports Jojola's and Sanchez's Convictions for Conspiracy To Commit Murder*

Although we reverse Jojola's and Sanchez's convictions for conspiracy to commit murder because of the erroneous jury instruction, we must also evaluate their claim that, as tried, their convictions for this offense are not supported by substantial evidence. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks v. United States* (1978) 437 U.S. 1, 11 [98 S.Ct. 2141, 57 L.Ed.2d 1].) To avoid placing a defendant in double jeopardy, a reviewing court that reverses a conviction due to legal error must assess the defendant's challenge to the sufficiency of the evidence to determine whether the defendant may be retried for the offense. (See *People v. Morgan* (2007) 42 Cal.4th 593, 613; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) "[T]he defendant . . .

may preserve for himself whatever double jeopardy benefits accrued in his first trial notwithstanding some fatal defect in the proceedings." (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 72, fn. 14.)

In considering a claim of insufficient evidence in a criminal case, "we review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Westerfield* (2019) 6 Cal.5th 632, 713.) In applying this test, we "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Penunuri*, *supra*, 5 Cal.5th at p. 142.) "'Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.'" (*People v. Clark* (2016) 63 Cal.4th 522, 626; accord, *People v. Ghobrial* (2018) 5 Cal.5th 250, 277.)

The record contains sufficient evidence Jojola and Sanchez, as well as Quesada, conspired with Morales with the specific intent to kill Vargas. The evidence unquestionably supported the inference all four defendants agreed to extort $300 from Vargas for showing disrespect by taking Morales to a "hot" house where there was ongoing police surveillance. Vargas was told his actions were a sign of disrespect not just for Morales but for "all of them"; and the four men appeared to operate in a coordinated manner when they directed Vargas to the backyard of the Quesada house, positioning themselves around him in an intimidating way and demanding he pay them "or else."

Vargas testified he understood "or else" to be a threat on his life, and the jury reasonably could have concluded such a mortal threat was implicit in those words. Indeed, after making the threat, the men demonstrated their seriousness by falsely imprisoning Vargas, repeatedly beating him and imposing deadlines (1:18 a.m. and 3:18 a.m.) that suggested gang-style consequences for failure to comply.

Although it was Morales and Quesada who initially demanded the $300 payment, Vargas testified Jojola also said something about the money while he was surrounded in the backyard. According to Figueroa, when she was allowed to leave the house to raise the money, Sanchez told her Vargas could not leave until payment was made. While Figueroa was out, Jojola sent her threatening text messages, using terminology that emphasized this was an 18th Street gang matter. And Morales borrowed Jojola's car for the four rides he took with Vargas on July 8, including the final drive to the secluded area where Vargas was killed.

On this record, particularly when considered with the testimony of the People's gang expert, it was reasonable for the jury to conclude Jojola and Sanchez, together with Morales and Quesada, agreed and intended to kill Vargas if he did not pay the $300 for having disrespected Morales, the other three men and their gang.

3. *Jojola and Sanchez Were Properly Convicted of Attempted Premeditated Murder Under the Natural and Probable Consequences Doctrine*

Jojola and Sanchez were convicted of attempted premeditated murder on the theory they aided and abetted the attempted extortion and false imprisonment of Vargas (the target offenses), and Morales's attempted murder of Vargas (the nontarget offense) was the natural and probable consequence of the target offenses. They urge reversal of these convictions on three grounds: (1) SB 1437 implicitly repealed the natural and probable consequences doctrine as a basis for conviction of attempted murder; (2) there is insufficient evidence to support their convictions under the natural and probable consequences doctrine; and (3) in light of *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), in which the Supreme Court held an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine, the doctrine may not be the basis for a conviction of attempted premeditated murder. None of these arguments has merit.

a. *SB 1437 applies only to accomplice liability for felony murder and murder under the natural and probable consequences doctrine, not attempted murder*

SB 1437, effective January 1, 2019, amended sections 188 and 189 and added section 1170.95 to the Penal Code, significantly modifying the law relating to accomplice liability for

murder. New section 188, subdivision (a)(3), provides, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."[8]

New section 189, subdivision (e), in turn, provides with respect to a participant in the perpetration or attempted perpetration of a felony listed in section 189, subdivision (a), in which a death occurs—that is, as to those crimes that provide the basis for the charge of first degree felony murder—that individual is liable for murder only if one of the following is proved: "(1) The person was the actual killer[;] [¶] (2) [t]he person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree[; or] [¶] (3) [t]he person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."[9]

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[8] Prior to enactment of SB 1437, section 188, subdivision (a), provided, "For purposes of Section 187, malice may be express or implied. [¶] (1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature. [¶] (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

[9] The conditions for imposing liability for first degree felony murder specified in section 189, subdivision (e), do not apply to a participant in one of the enumerated felonies when the victim is a peace officer who was killed while in the course of his or her duties when the defendant knew or reasonably should have

In supplemental briefs filed after the Supreme Court transferred their cases to us with directions to reconsider our prior decision in light of SB 1437, Jojola and Sanchez contend the new legislation, and specifically new section 188, subdivision (a)(3), invalidates their convictions for attempted premeditated murder under the natural and probable consequences doctrine. As counsel for Jojola phrases it, "Now that malice cannot be imputed, a defendant who did not have malice cannot be held liable for attempted murder under a natural and probable consequences theory."

In *Lopez*, *supra*, 38 Cal.App.5th at page 1104 we held SB 437 does not modify the law of attempted murder, explaining there was nothing ambiguous in the language of SB 1437, which, in addition to omitting any reference to attempted murder, specifically identifies its purpose as the need "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) We added that the Legislature's obvious intent to exclude crimes other than murder "is underscored by the language of new section 1170.95, the provision it added to the Penal Code to permit individuals convicted before SB 1437's effective date to seek the benefits of the new law from the sentencing court. Section 1170.95, subdivision (a), authorizes only those individuals 'convicted of felony murder or murder under a natural and probable

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known that the victim was a peace officer engaged in the performance of his or her duties. (See § 189, subd. (f).)

consequences doctrine' to petition for relief; and the petition must be directed to 'the petitioner's murder conviction.' Similarly, section 1170.95, subdivision (d)(1), authorizes the court to hold a hearing to determine whether to vacate 'the murder conviction.'" (*Lopez*, at p. 1105.)

As part of our statutory analysis in *Lopez* we expressly considered, and then rejected, the argument being made by Jojola and Sanchez that, by redefining the elements of murder, SB 1437 impliedly eliminated the natural and probable consequences doctrine as a basis for finding an aider and abettor guilty of attempted murder. The premise of this implied repeal argument is that, generally to be guilty of an attempt to commit a crime, the defendant must have specifically intended to commit all the elements of that offense. Since a conviction for murder now requires proof of malice except as specified in section 189, subdivision (e), and malice may not be imputed to a person based solely on his or her participation in an underlying crime, Jojola and Sanchez reason, the natural and probable consequences theory of aider and abettor liability is no longer viable.

The premise for this argument—that to be guilty of an attempt an accomplice must have shared the actual perpetrator's intent—is correct as to direct aider-and-abettor liability (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118 ["when the charged offense and the intended offense—murder or attempted murder—are the same, . . . the aider and abettor must know and share the murderous intent of the actual perpetrator"]; see *Chiu*, *supra*, 59 Cal.4th at pp. 158, 167), but it is inapplicable to offenses charged under the natural and probable consequences doctrine, which is based on a theory of vicarious liability, not actual or imputed malice. (*Chiu*, at pp. 158, 164.) As a matter of statutory

interpretation, SB 1437's legislative prohibition of vicarious liability for murder does not, either expressly or impliedly, require elimination of vicarious liability for attempted murder. (See *Lopez*, *supra*, 38 Cal.App.5th at p. 1106.)

b. *Substantial evidence supports Jojola's and Sanchez's convictions for attempted premeditated murder*

The trial court instructed the jury that to find Jojola and Sanchez guilty of the crime of attempted murder, the People had to prove beyond a reasonable doubt that: (1) "the . . . crimes . . . of attempted extortion and . . . false imprisonment were committed"; (2) the defendant "aided and abetted in those crimes"; (3) "a co-principal in [those crimes] committed the crime of attempted murder"; and (4) "the crime of attempted murder was a natural and probable consequence of the commission of the crimes [of attempted extortion and false imprisonment]." The court then read the standard definition of a "natural and probable" consequence.

In challenging the sufficiency of the evidence on this charge, Jojola and Sanchez contend Morales acted alone, and they could not have foreseen he would drive Vargas to a secluded area and shoot him. While the evidence may show they attempted to extort money from Vargas and falsely imprisoned him, they argue, they ceased any further criminal behavior when Vargas failed to come up with the money. At that point, Morales went off on a methamphetamine-fueled frolic of his own and attempted to kill Vargas—a consequence they could not possibly have foreseen.

"A nontarget offense is a '"natural and probable consequence"' of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The

inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability "'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" [Citation.] Reasonable foreseeability 'is a factual issue to be resolved by the jury.'" (*Chiu*, *supra*, 59 Cal.4th at pp. 161-162, quoting *People v. Medina* (2009) 46 Cal.4th 913, 920.)

Applying this objective standard, we reject Jojola and Sanchez's contention. As discussed, the jury reasonably could have interpreted the attempted extortion to include a death threat (or at least a threat that carried with it the real prospect of death) for failure to comply. This was not an idle remark by a notorious loudmouth, but a threat from gang members who felt so disrespected they beat and imprisoned a man while they sought to collect their "tax." According to the People's gang expert, if the gang issued an ultimatum to "pay us $300 or else," the gang would follow through with the threat to avoid appearing weak. As gang members, Jojola and Sanchez could be expected to have known this much about gang culture. They also could be expected to have known, based on the evidence in the record, that Morales had a gun ready to use if necessary.

Because of the close nexus between the target crimes (attempted extortion and false imprisonment) and the nontarget crime (attempted murder), the jury had sufficient evidence before it to find Jojola and Sanchez guilty of attempted murder. (See *People v. Medina*, *supra*, 46 Cal.4th at pp. 922-923 [concluding that "the jury could reasonably have found that . . . a gang member[] would have or should have known that retaliation was

likely to occur"].) This close connection distinguishes the cases upon which defendants rely in bringing this challenge. (See *People v. Leon* (2008) 161 Cal.App.4th 149, 161 [concluding that there was no "close connection" between the crime of vehicle burglary and witness intimidation when one of the two burglars fired a shot in the area after a witness threatened to call the police]; *United States v. Andrews* (9th Cir. 1996) 75 F.3d 552, 556 [concluding that, when brother and sister agreed to retaliate against a specific victim who had punched the sister, the brother reasonably could not have foreseen that sister would "impulsively and on her own" shoot others who had not previously assaulted or antagonized her].)

c. *Liability for attempted premeditated murder under the natural and probable consequences doctrine requires reasonable foreseeability of attempted murder, not of attempted premeditated murder*

In *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*), the Supreme Court held, "[u]nder the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Id.* at p. 880.) Two years later in *Chiu*, the Court held "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine." (*Chiu, supra*, 59 Cal.4th at p. 166.) Nonetheless, the Court did not question the

continued viability of *Favor*, and instead simply distinguished it. (*Id.* at p. 163.)

To the extent Jojola and Sanchez contend we should extend the ruling in *Chiu* to convictions for attempted murder under the natural and probable consequences doctrine, we decline the request, as we remain bound by the holding in *Favor*. (*People v. Johnson* (2012) 53 Cal.4th 519, 527-528.) We similarly reject the suggestion that *Favor* violates the rule established in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], as extended in *Alleyne v. United States* (2013) 570 U.S. 99 [133 S.Ct. 2151, 186 L.Ed.2d 314], that every fact that increases a defendant's punishment must be determined by the jury beyond a reasonable doubt. Under *Favor* the premeditation finding, which is based on the mens rea of the direct perpetrator (here, Morales) and results in an enhanced punishment, is determined by the jury after it decides the nontarget offense of attempted murder was foreseeable. (*Favor, supra,* 54 Cal.4th at pp. 879-880.) The jury was so instructed in this case and found *Morales* had acted with the requisite intent and premeditation. Again, we decline to revisit this aspect of *Favor*.[10]

4. *Substantial Evidence Supports Imposition of the Criminal Street Gang Enhancements*

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[10] As discussed, in granting review in *People v. Mateo*, S232674, *supra*, the Supreme Court had indicated its intention to reconsider the continued viability of *Favor* in light of its decision in *Chiu* and the United States Supreme Court's decision in *Alleyne v. United States*, *supra*, 570 U.S. 99. However, the Court transferred *Mateo* to the court of appeal in March 2019 with instructions to vacate its prior opinion and consider the effect, if any, of SB 1437 on the case. *Favor* thus remains binding authority.

Section 186.22, subdivision (b)(1), provides for a sentence enhancement for any person convicted of a felony that was committed for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote, further or assist in any criminal conduct by gang members. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; see *People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*) ["the Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it 'clear that a criminal offense is subject to increased punishment under the [gang enhancement statute] only if the crime is "gang related"'"].) A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [certain enumerated] criminal acts[,] . . . having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" means "the commission of . . . or conviction of two or more of [certain enumerated offenses]" that "were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) "'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support [a] . . . gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *Albillar*, *supra*, 51 Cal.4th

at p. 63.) An expert may render an opinion assuming the truth of facts set forth in a hypothetical question provided the hypothetical question is based on facts shown by admissible evidence. (See *People v. Mendez* (2019) 7 Cal.5th 680, 695 [case-specific gang evidence was first admitted through an appropriate witness; then the People's expert assumed its truth in a properly worded hypothetical question in the traditional manner]; *People v. Sanchez* (2016) 63 Cal.4th 665, 684 [gang expert may, in answering a hypothetical question, assume the truth of hearsay evidence that has been properly admitted through an applicable hearsay exception]; see also *Vang*, at p. 1048 [gang experts may, "based on hypothetical questions that track[]" the evidence, offer an opinion on whether a crime, if committed by the defendant, was done "for a gang purpose"].)

Jojola and Sanchez do not seriously dispute they, Morales and Quesada were all fellow gang members at the time of the crimes. However, they contend Officer Garcia, the People's gang expert, offered nothing more than an unsubstantiated opinion the crimes, and particularly the attempted murder of Vargas, were committed for the benefit of the 18th Street gang. They argue, as Morales did in his appeal, that Morales's motive in shooting Vargas was purely personal, a spontaneous act during a psychotic break while he and Vargas were on a methamphetamine binge. Dr. Sanders, the defense expert, supported this interpretation of the events.

Other evidence, however, properly relied upon by Officer Garcia, contradicts this view. There was overwhelming evidence Morales was acting in association with his three fellow gang members during the attempted extortion and false imprisonment of Vargas and ample evidence the four men perceived the

disrespect shown to Morales to be a sign of disrespect to the entire gang. Indeed, as discussed, Quesada told Vargas he had "[d]isrespected all of them" by placing Morales in harm's way. Defendants then directed Vargas to the backyard, where he was beaten by two gang members, threatened and ordered to pay what could be interpreted as a "tax" imposed by gang members.

The gang members then continued to issue threats, and did so using a vital tool of the gang trade—gang intimidation. Morales told Figueroa that she had until 1:18 a.m. to get the money; and, when she missed that deadline, Jojola demanded that she return with the money by 3:18 a.m. The repeated use of the number "18" was a thinly veiled reference to the 18th Street gang, signaling that defendants were operating in their capacity as gang members and that failure to comply would come with gang-style consequences.

Substantial evidence demonstrated not only that the crimes were committed in association with, or for the benefit of, the 18th Street gang, but also that they were done so with "the specific intent to promote, further, or assist in" criminal conduct by its gang members. As the Supreme Court has explained, "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68.) It was not necessary, as defendants contend, to show that the crimes were intended to enhance the reputation of 18th Street or were broadcast to the community or to other gang members.

In re Daniel C. (2011) 195 Cal.App.4th 1350, cited by defendants, does not suggest a different outcome. In that case,

three young gang members or affiliates entered a store; and one of them, Daniel C., attempted to steal a bottle of liquor. When confronted by a store employee, Daniel C. raised the bottle as if to hit or throw it at the employee. The bottle broke on a nearby machine and hit the employee. Daniel C. then ran out of the store. (*Id*. at p. 1353.) The court of appeal reversed the juvenile court's finding the gang enhancement applied to the robbery charge, holding there was insufficient evidence Daniel C. had committed the crime with the specific intent to promote or assist any criminal conduct by gang members. The court distinguished *Albillar* as being "far different factually" because there was no evidence Daniel C. had acted in concert with his companions in committing the robbery: Daniel C.'s "companions left the store before he picked up the liquor bottle, and they did not assist him in assaulting [the employee]. Indeed, there is no evidence in the record that [Daniel C.]'s companions even saw what happened in the store after they left. Moreover, there is no evidence that [the employee] was aware that [Daniel C.], or his companions who had been in the store earlier, were gang members or 'affiliates.'" (*Id.* at p. 1361.) In contrast, the facts here clearly show Jojola and Sanchez engaged in concerted action with Morales and Quesada in terrorizing Vargas and that the subsequent attempted murder, a natural and probable consequence of those actions, was similarly gang related.

DISPOSITION

Jojola's and Sanchez's judgments are reversed with respect to count 1, conspiracy to commit murder and the related criminal street gang enhancement, and affirmed in all other respects. If the district attorney's office fails to give written notice in the trial court of its intent to retry count 1 and the related gang enhancement within 30 days of the issuance of the remittitur, the trial court shall resentence Jojola and Sanchez on the remaining counts and enhancements.

Quesada's appeal is dismissed as moot.

PERLUSS, P.J.

We concur:

SEGAL, J.

FEUER, J.